United States Court of Appeals
For the First Circuit

No. 81-1561.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-APPELLEES,

v.

JOHN O'BRYANT, ET AL.,
DEFENDANTS-APPELLEES,

LOCAL 66, BOSTON TEACHERS UNION,
AFT, AFL-CIO,
INTERVENOR-APPELLANT.

No. 81-1617.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-APPELLEES,

v.

JOHN D. O'BRYANT, ET AL.,
DEFENDANTS-APPELLEES,

BOSTON ASSOCIATION OF SCHOOL
ADMINISTRATORS AND SUPERVISORS,
PLAINTIFF-APPELLANT.

No. 81-1618.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-APPELLEES,

v.

JOHN D. O'BRYANT, ET AL.,
DEFENDANTS-APPELLEES,

CONCERNED BLACK EDUCATORS OF BOSTON,
PLAINTIFF-INTERVENOR, APPELLANT.

No. 81-1619.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-APPELLEES,

v.

JOHN D. O'BRYANT, ET AL.,
DEFENDANTS-APPELLEES,

CONCERNED BLACK EDUCATORS OF BOSTON,
PLAINTIFF-INTERVENOR, APPELLANT.

No. 81-1646.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-APPELLEES,

v.

JOHN D. O'BRYAN[illegible] ET AL.,
DEFENDANTS-APPELLEES,

CONCERNED BLACK EDUCATORS OF BOSTON,
PLAINTIFF-INTERVENOR, APPELLANT.

JUDGMENT

Entered: February 17, 1982

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The order of the District Court of June 2, 1981, and the order of July 24, 1981 denying reconsideration of that order are affirmed;

The order of the District Court of July 9, 1981, is affirmed; and

The order denying Concerned Black Educators of Boston's motion to rescind the June 2, 1981 order is affirmed.

No costs on appeal.

By the Court:

DANA H. GALLUP,
Clerk.

[cc: Messrs. Miller, Kelly, Johnson, Simonds, Blumenthal, Somers, Mss. Playter and Gertner]

CONCERNED BLACK EDUCATORS OF BOSTON,

INTERVENOR, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. W. ARTHUR GARRITY, JR., *U.S. District Judge*]

Before
COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Bruce A. Miller, with whom *Christopher P. Legghio, Stuart M. Israel, Miller, Cohen, Martens & Sugarman, P.C., James T. Grady*, and *Grady and McDonald* were on brief, for Local 66, Boston Teachers Union, AFT, AFL-CIO.

Paul F. Kelly, with whom *Richard W. Coleman*, and *Segal, Roitman & Coleman* were on brief, for Boston Association of School Administrators and Supervisors, AFL-CIO.

Caroline B. Playter, with whom *Doyle, Playter, Novick & Berkin*, and *Kenneth Kimerling* were on brief, for El Comite De Padres.

Larry J. Johnson, with whom *Robert Pressman*, was on brief, for *Tallulah Morgan, et al.*

Marshall Simonds, with whom *Henry C. Dinger*, and *Goodwin, Procter & Hoar* were on brief, for Boston School Committee.

Robert H. Blumenthal, Counsel, Department of Education, with whom *Robert H. Bohn, Jr.*, Special Assistant Attorney General, was on brief, for Board and Commissioner of Education.

John Somers, on brief for The A. Philip Randolph Institute, amicus curiae.

Nancy Gertner, Charles W. Rankin, and *Silverglate and Gertner*, on brief for Concerned Black Educators of Boston.

February 17, 1982

CAMPBELL, *Circuit Judge*. These consolidated appeals are from orders of the district court in the Boston school desegregation case. A short history may prove helpful. In 1974, the district court found that Boston public school

authorities had knowingly engaged in a policy of racial discrimination and intentionally maintained a dual school system along racially segregated lines. *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974). This court affirmed. *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The basic remedial orders were entered in 1975 and affirmed in 1976. *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). In addition to holding that pupil assignment and other actions were discriminatory, the district court found that defendants discriminated in the area of faculty and staff hiring[1] and assignment. 379 F.Supp. at 456-66. Accordingly, the court ordered that black and white teachers be hired on a one-for-one basis until the percentage of black faculty reached 20 percent (the approximate percentage of blacks in Boston at that time),[2] with affirmative recruitment to continue until a figure of 25 percent black faculty was reached, *Morgan* v. *Kerrigan*, 388 F. Supp. 581 (D. Mass. 1975), and this court affirmed, 530 F.2d 431 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). An order to the same effect with respect to administrators was entered on February 24, 1976; this order was neither published nor appealed. In 1978, the district court found that the defendants had not complied with its faculty recruitment and hiring orders, and therefore modified those orders to require that the percentage of black teachers increase annually by at least

[1] In 1972-73, 5.4 percent of the permanent teachers were black; in 1970-71, 3.5 percent of the administrators were black. 379 F. Supp. at 463.

[2] The percentage of black students in the Boston public schools at that time was approximately 35 percent. *Morgan* v. *Kerrigan*, 388 F. Supp. at 582. Preliminary 1980 census figures show an overall black population in Boston of over 22 percent; the projected percentage of black children in the Boston public schools for 1981 was over 46 percent.

one and one-half percentage points until the 20 percent goal was attained. This unpublished order was entered July 5, 1978 and was not appealed.

By early 1981, the percentage of black teachers was 19.09 percent and that of black administrators 20.53 percent. This progress was threatened, however, by a budget crisis precipitated by decreased funding. In order to comply with its reduced budget, the Boston School Committee considered massive layoffs of teachers and administrators. It was faced, however, with conflicting obligations: on the one hand, its collective bargaining agreements called for layoffs by reverse seniority; on the other, such a procedure would drastically reduce the percentage of black teachers and administrators (most of whom had been hired in the last few years and thus had little seniority), in violation of the district court's desegregation orders. The School Committee decided that if layoffs of teachers proved to be necessary, they should be conducted so as to maintain the current percentage of black teachers, but layoffs of administrators, if necessary, should be conducted by reverse seniority. It filed motions with the district court for approval of these decisions. On June 2, 1981, the district court granted the motion — with minor modifications — with respect to the teachers.[3] On July 9, 1981, it denied the motion with respect to the administrators and ordered that the percentage of black administrators be maintained even in the face of layoffs.

The court's orders were conditional. That is, they did not themselves mandate any layoffs. Rather, they simply specified the principles determining who should be laid off if,

[3] The order also specifies that laid-off black teachers will have an absolute preference in recall until the 20 percent goal is reached. The order suspends the defendants' obligation to engage in affirmative recruitment aimed at reaching a goal of 25 percent black faculty, until all tenured teachers who are laid off have been recalled.

for reason of economics or otherwise, layoffs were in fact made. Layoffs have since taken place in accordance with the priorities established in the court orders, thus maintaining the existing percentages of black faculty and administrators at close to 20 percent. The Boston Teachers Union ("BTU") asserts that between 700 and 1,100 teachers have been laid off. If the seniority approach had been followed, this would have reduced the percentage of black teachers to somewhere around 8 percent. Our information on the administrators from the Boston Association of School Administrators and Supervisors ("BASAS") is more precise: 15 headmasters and principals with permanent appointments were laid off. If seniority had been followed, 13.8 percent of those remaining would be black.

The appeals consolidated here for our review are as follows. In No. 81-1561, intervenor BTU appeals from the June 2 order and from the district court's denial of its request for reconsideration of that order on July 24, 1981. The plaintiff class, the School Committee, the State Board of Education, and intervenors El Comite de Padres Pro Defense de la Educacion Bilingue and Concerned Black Educators of Boston ("CBEB") have filed briefs as appellees; the A. Philip Randolph Institute has filed a brief as *amicus curiae* urging reversal. In No. 81-1617, intervenor BASAS appeals from the July 9 order. The appellees are the same as those in No. 81-1561, with the exception that the School Committee takes no position in this appeal. Finally, Nos. 81-1618, 81-1619, and 81-1646 are appeals brought by CBEB arguing that the orders do not go far enough in remedying past discrimination. No. 81-1618 is from the June 2 order; No. 81-1619 is from the denial of CBEB's motion to rescind that order; and No. 81-1646 is from the July 9 order.

The standards for equitable remedies in school desegregation cases have been set forth by the Supreme Court in *Milliken* v. *Bradley*, 433 U.S. 267, 280-81 (1977). As dis-

cussed *infra*, we believe that the district court committed no abuse of discretion under *Milliken*, and we therefore affirm its orders. We note additionally, however, that the procedural posture of this case also argues for an affirmance. BTU asserted virtually none of the arguments it now presents on appeal to the district court during the argument conducted below concerning the faculty order entered June 2. At that argument, it chiefly spoke against the need for any layoffs and also against proposals to tailor the layoff procedure so as actually to increase beyond present ratios the percentage of black faculty. As far as we can glean from the record, it did not argue that the Boston School Committee's proposed formula for laying off teachers — the formula largely adopted by the district court — would involve unconstitutional discrimination, nor did it make any request for an evidentiary hearing, until its motion for reconsideration filed almost seven weeks after the original order. The district court must have broad discretion in deciding such motions for reconsideration, especially where no reasons are advanced for the movant's failure to present its arguments earlier. *Cf. Willens* v. *University of Massachusetts*, 570 F.2d 403, 406 (1st Cir. 1978) (discretion to grant relief from judgment). Similarly, BASAS did not argue that the district court's maintenance approach was unconstitutional at the July 9 hearing on the motion with respect to the administrators. Finally, CBEB had filed no motions until after the June 2 order was entered; the district judge understandably expressed considerable doubt as to his ability to grant the relief CBEB requested in the absence of a prior motion. On appeal, the district court's exercise of its discretion is judged by the information and motions before it at the time it rendered its decision — not by hindsight. On this basis, it would be difficult — quite apart from our view of the substantive merits as discussed below — to overturn the lower court's handling of the various issues then before it.

The importance of this case, however, and its human impact, naturally make us hesitant to decide on procedural and technical grounds. We thus turn to the merits of the controversy. The first *Milliken* requirement is that, "like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to 'the *condition* alleged to offend the constitution. . . .' " *Milliken* v. *Bradley*, 433 U.S. at 280 (citations omitted; emphasis in original). It is plain that the present order, aimed at preserving a goal concerning the percentage of black teachers and administrators, is directly related to the unconstitutional conditions earlier found by the district court. This court has twice upheld the underlying district court orders concerning the percentage of black faculty as part of the desegregation remedy. *Morgan* v. *Kerrigan*, 509 F.2d 599 (1st Cir. 1975); 530 F.2d 481 (1st Cir. 1976). In 1975, we said that, having "found pervasive violations of the constitutional rights of black school children in the Boston schools," the district court had an "obligation . . . to rectify those violations," and we concluded that orders related to the percentage of black faculty "are directed toward the objective of eradicating the segregated system that has prevailed in the Boston schools, and [are] clearly within [the district court's] power in the context of this case." 509 F.2d at 600-01. We further held in 1976 that the 20 percent goal was a valid part of the effort "to eliminate segregation and its effects 'root and branch,' " 530 F.2d at 432, *citing Green* v. *County School Board*, 391 U.S. 430, 438 (1968). The 20 percent formula is thus clearly a part of the remedy earlier approved in this case to rectify the unconstitutional conditions found to exist. The purpose of the orders under review is to safeguard the progress toward desegregating the faculty and administrative staff — and thus the progress toward dismantling the dual school system — already made.

Unlike BASAS, BTU never really argues otherwise. Rather, it asserts that desegregation has now been accomplished and that the district court's powers are therefore at an end. *See generally Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). This argument has no basis in the present record, however. We find no indication that BTU ever moved in the district court that the court should withdraw, nor has it requested a hearing for the purpose of introducing evidence in support of such a motion.[4] Absent proceedings and proof showing that Boston's dual school system has been abolished, the district court retained power to make orders premised on the unconstitutional conditions it found to exist.[5]

We turn next to the second *Milliken* requirement: "the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' " *Milliken* v. *Bradley*, 433 U.S. at 280 (citation omitted; emphasis in original). Ap-

[4] While BTU's motion for reconsideration included a request for an evidentiary hearing, *see infra* p. 13, that hearing was, as stated in the motion, "for the purpose of fully reviewing the impact on all the parties of the Court's June 2 order."

[5] The record before us amply supports a conclusion that the desegregation remedial goals have not been fully achieved. The 25 percent goal, which this court characterized as a "built-in terminus for court responsibility," *Morgan* v. *Kerrigan*, 530 F.2d at 434, is not even close to fulfillment. The 20 percent goal has been barely achieved with respect to the administrators and is close to achievement with respect to the teachers. This goal, however, was never intended to delimit the court's remedial powers, and, moreover, we noted that "time may indicate the goal to be too modest." *Id.* The plaintiff class has indicated below that it desires to increase the 20 percent figure to over 22 percent. The court stated that its rulings here under review were without prejudice to the proposals to increase the 20 percent goal.

pellants BTU and BASAS contend that the orders do not satisfy this requirement because they benefit black teachers and administrators who were never shown to be the victims of hiring discrimination. They cite cases such as *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), which they contend limit the award of retroactive seniority and like benefits to identiable victims of hiring discrimination. The argument is that the district court's orders discriminate in employment and that they lack the proper factual predicate because no minority individuals have been identified as the victims of any discrimination.

A similar argument was made to this court when the 20 percent goal was first ordered, and we rejected it then, as we do now:

> This argument fundamentally misapprehends the nature of this case. The plaintiffs are not the black teachers or would-be teachers who have been discriminated against because of their race. The district court's examination of the School Committee's ... policies was undertaken to determine whether those policies violated the rights of black Boston public school children. It is the rights of those children that the order in issue is intended to protect.

Morgan v. *Kerrigan*, 530 F.2d at 432. *See also Morgan* v. *Kerrigan*, 509 F.2d at 600 n.3. It has been recognized from the beginning that the victims here are the black school children, not the possible hiring discriminatees. *See Morgan* v. *Hennigan*, 379 F. Supp. at 456. The orders are thus designed, insofar as possible, to make the school children whole. Proof of individual hiring discrimination is irrelevant. The employment cases cited by appellants are inapposite as to this issue. *See Arthur* v. *Nyquist*, 520 F. Supp. 961, 966 (W.D.N.Y. 1981).

The plaintiff class has a right to an education in a school system free of racial discrimination in the employment of teachers and staff. *Morgan* v. *Hennigan*, 379 F. Supp. at 456, 463. The elimination of the vestiges of a segregated school system cannot be accomplished until the effects of past hiring discrimination have been eradicated. *See supra* pp. 6-7. Such discrimination, if allowed to continue, may lead to difficulties in fully integrating the schools and in eliminating the maintenance of a dual school system. An integrated faculty and staff is also necessary to bring black students and parents fully into the school community and decisionmaking processes and to counteract their past isolation. A racially balanced faculty also provides black students with role models, which may be "important because they can encourage minority students to higher aspirations and at the same time work to dispel myths and stereotypes about their race." *Oliver* v. *Kalamazoo Board of Education*, 498 F. Supp. 732, 748 (W.D. Mich. 1980), *appeal pending*. We thus conclude that the orders here are remedial: they are designed to make the children whole, to vindicate their rights, and that is indeed their effect. Indeed, under the principle of the law of the case, such a conclusion is compelled by our past decisions in this case.

Appellants argue further that even if these orders are remedial, they constitute forbidden racial preferences. Once again, we have already rejected a similar argument with respect to the one-for-one hiring ratio, *Morgan* v. *Kerrigan*, 530 F.2d at 432 n.2, and we do so now with respect to the instant orders. Once there has been a finding of intentional racial discrimination, race-conscious remedies are a constitutionally valid means of ameliorating the effects of such discrimination. *See, e.g., Fullilove* v. *Klutznick*, 448 U.S. 448, 477-78 (1980) (Burger, C.J., announcing the judgment of the Court); *id.*, at 517-19 (Marshall, J., concurring in the judg

ment); *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 305 (1978) (Powell, J., announcing the judgment of the Court); *id.*, at 362-79 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Indeed, once a court has found racial discrimination in a school case, race-conscious remedies not only are permitted, they are said to be required where color-blind approaches would be inadequate. *See, e.g., Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. at 28; *Green* v. *County School Board*, 391 U.S. 430 (1968).

There are, of course, limits to the use of race-conscious remedies, whether they be statutory or court-ordered. We have stated that

> racial criteria should be strictly scrutinized and given legal sanction only where a compelling need for remedial action can be shown. . . . [T]he means chosen to implement the compelling interest should be reasonably related to the desired end.

Associated General Contractors of Massachusetts, Inc. v. *Altshuler*, 490 F.2d 9, 17-18 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974). The constitutional violations found in this case certainly, under the precedents cited *supra*, constitute the "compelling need" for a race-conscious remedy. Once this has been established, the proper test is essentially one of reasonableness. Other circuits are substantially in accord, stating, for example, that affirmative action plans may not "unnecessarily" "trammel" the interests or opportunities of whites. *See Valentine* v. *Smith*, 654 F.2d 503, 510 (8th Cir.), *cert. denied*, 50 U.S.L.W. 3486, _____ U.S. _____ (1981); *Detroit Police Officers Association* v. *Young*, 608 F.2d 671, 696 (6th Cir.), *cert. denied*, 101 S.Ct. 3079, _____ U.S. _____ (1980); *United States* v. *City of Miami*, 614 F.2d 1322, 1339, *reh. en banc granted*, 625 F.2d 1310 (5th Cir. 1980); *see also United Steelworkers of America* v. *Weber*, 443 U.S. 193, 208 (1979).

The orders here meet this test of reasonableness. They were necessary to safeguard the progress toward desegregation painstakingly achieved over the last seven years. Without them, the percentage of blacks would have fallen almost to its level nearly a decade ago, before this suit was brought. Such a result could not be countenanced. *See generally Green* v. *County School Board*, 391 U.S. at 438-39; *Morgan* v. *McDonough*, 540 F.2d 527, 533 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977). Nor was the position taken by the district court an extreme one: CBEB, for example, argues that it should have gone much further. The court postponed achievement of the 25 percent goal, rather than ordering a layoff procedure to meet the goal. It chose to forego using the layoffs as a means of achieving greater desegregation, in favor of simply ensuring that they did not threaten the progress already made.[6]

We thus conclude that the district court's orders were a reasonable response to the situation which confronted it, and that, in the circumstances, they do not constitute forbidden racial preferences. In what is to our knowledge the only other case dealing with this precise issue, a district court came to the same conclusion: a preference for black teachers in layoffs and recalls is a reasonable and constitutionally permissible solution to the problem. *See Oliver* v. *Kalamazoo Board of Education*, 498 F. Supp. 732, 750-55 (W.D. Mich. 1980), *appeal pending*. We are not unmindful of the substan-

[6] This discussion also serves to dispose of the issues raised by CBEB's appeals. CBEB essentially contends that the layoffs should not slow progress toward the 25 percent goal. We cannot say that the district court abused its discretion in entering the orders it did. The 25 percent goal, while real, *see* note 5, *supra*, was not to be achieved by hiring preferences, but simply by affirmative recruitment. The proposed layoffs presented the court with difficult decisions involving competing interests. As discussed above, we think the orders entered were reasonable.

tial human costs engendered by these layoffs, but those costs are, for the most part, the product of the layoffs themselves, and not of the court orders, which in themselves required no layoffs at all. We understand, and sincerely regret, the fact that the expectations of certain teachers have been defeated,[7] but the alternative would be to defeat the expectations of the plaintiff class of school children and their parents. The district court struck a reasonable balance between these competing interests, and we therefore see no reason to disturb it.

We turn, then, to the last prong of the *Milliken* test:

> [T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. . . . If, however, "school authorities fail in their affirmative obligations . . . judicial authority may be invoked."

Millliken v. *Bradley*, 433 U.S. at 280-81 (citation omitted). This factor cuts in favor of the district court's decision with respect to the teachers, since the district court accepted (with only minor modifications) the Boston School Committee's own proposal for dealing with the situation. This is not a case where a judicial formulation has been imposed upon a resistant and objecting local administrative body. The factor initially weighs against the order in the administrators' case, because the court refused to grant the School Committee's motion to conduct layoffs by seniority. For several reasons,

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[7] We do not accept appellants' argument that the collective bargaining seniority provisions preclude the court from taking the action it did. In the first place, the contract with the teachers provides that the layoff and recall procedure shall be subject to all lawful federal orders. Second, the contracts alone cannot bar a federal court from granting effective relief for constitutional violations. *See Arthur* v. *Nyquist*, 520 F. Supp. at 965, and cases cited therein.

however, this alone does not mandate reversal. First, the order is not particularly intrusive into local affairs; it simply mandates continued compliance with earlier orders, without becoming involved in such local matters as control of the budget, *see infra* p. 14. Second, the School Committee itself has taken no position in this appeal, so it is difficult to accept an argument premised on that body's interest in managing its own affairs. Indeed, the other local authority involved, the State Board of Education, has filed a brief in support of the order. Finally, as *Milliken* itself recognizes, even the interest of local authorities could not preclude a court from remedying constitutional violations. More intrusive measures have been authorized, where necessary, in other aspects of this case. *See Morgan* v. *McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977) (South Boston High School receivership).

Appellant BTU raises one final argument, that the district court erred in failing to hold an evidentiary hearing before granting the School Committee's motion. We note at the outset that BTU never requested such a hearing until its motion for reconsideration, which by itself provides a strong reason for rejecting the argument, *see supra* pp. 5-6. In addition, the evidence that BTU wishes to present is, for the most part, either sufficiently known to the district court or irrelevant. The district court was apprised of the fundamental information it required for a decision: the impact that layoffs would have on compliance with court-ordered remedies. The court was certainly aware of the impact that layoffs would have on those laid off. The layoffs themselves were never ordered by the court, whose orders were conditional, *see supra* p. 4. Nor was the court obliged to consider budget reallocation as an alternative to the layoffs, since the School Committee's own motion kept it in substantial compliance with the court orders. Absent noncompliance, the court

would have no justification to intrude upon local matters such as budget decisions. *Compare Oliver* v. *Kalamazoo Board of Education*, 498 F. Supp. at 746-50. We thus see no reversible error in the district court's denial of BTU's request for an evidentiary hearing in its motion for reconsideration.

Affirmed.

Adm. Office, U.S. Courts – Addison C. Getchell & Son, Inc.

United States District Court
For the District of Massachusetts

TALLULAH MORGAN ET AL.,)
Plaintiffs,)
vs.) Civil Action No. 72-911-0
JOHN O'BRYANT ET AL.,)
Defendants.)

Before: Hon. W. Arthur Garrity, Jr.,
District Judge.

Court Room No. 5
Federal Building
Boston, Massachusetts
July 9, 1981

Appearances:

Larry J. Johnson, Esq.,
for the plaintiffs.

Goodwin, Procter & Hoar, Esqs., by
Marshall Simonds, Esq., and
Henry C. Dinger, Esq.,
for the defendant School Committee.

Robert H. Bohn, Esq.,
Assistant Attorney General,
for the state defendants.

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for the Boston Home and School Association.

Silverglate and Gertner, Esqs., by
Atty. Nancy Gertner,
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proposal and McDonough's proposal, specifically when they talk about tie-breakers, suggest that they don't want to go by evaluations, they were going to go by strict seniority. They were not so concerned for competence themselves.

I am concerned here about the system that is now 46.4 percent black, the teaching population that would be 20 percent, and the administrative staff, namely, those in power, being overwhelmingly white. That, it seems to me, is a symbolism that this Court cannot allow to happen.

Finally, if, as Mr. Simonds suggested, the School Committee filed — went through this vote, well knowing that this Court was the final authority, without any justification, then it was simply an exercise in political machination, then it was simply an exercise in political irresponsibility without justification in terms of this Court's findings, and knowing that this Court would have to take a position to reverse that vote, and under the circumstances, I think that that kind of symbolism, that kind of gesture, is really a little bit too late in the day for this case.

(Applause.)

THE COURT: Well, now, you people who are applauding couldn't have been here over the last seven years. I didn't see the people that are clapping here in the courtroom four, five, six, seven years ago. You can applaud downstairs on the sidewalk, but that doesn't go here. I remember very good presentations in other years without applause. There is just no occasion for it. It is different.

This is not a town meeting, it is a court of law, and I am endeavoring to apply legal principles.

With that preliminary, I will at this point rule on the motion for the modification, which is that the motion is denied, and I will state just four reasons, and, I hope, quickly.

The Court reaffirms what I consider to be the plain meaning of the February 24, 1976, order, as stated by some of the

counsel who spoke, Miss Gertner, Mr. Johnson, and others, and Mr. Bohn. It does not speak in terms of hiring. It speaks in terms of shortages and the elimination of shortages. It is in the context of hiring, but the language in my view needs no clarification beyond what I am giving it right now.

So that it means that there must be retained 20 percent black Category One administrators. That means principals and headmasters.

Secondly — this is in response to Mr. Simonds' specific request — this order does explicitly supersede any contrary or conflicting provisions of any collective bargaining agreement between the School Department and anyone else, especially, of course, in this instance BASAS, that is, the Boston School Administrators and Supervisors. I left the word "Supervisors" off when I mentioned it before.

Finally, and this is just by way of clarification, it is only because of a statement that was made by one of the lawyers that seniority should apply because it is color-blind. Well, I have got to pick up that point very, very briefly.

Anyone who is not aware that the orders in this case and this case is not color-blind misses the whole point to the desegregation case. I have said so often that I couldn't estimate the number of occasions, this is a race case. It is a black parents' and black children's case, with other minority intervening after the liability was over.

Does this Court base orders on color? Absolutely yes. Is it color-blind in its approach? Absolutely not. Must the School Department take color into account in carrying out these orders? Positively yes. Any case dealing with the remediation of racial discrimination is a color case, so all of these cases, not just school cases but any cases based upon racial discrimination, require that things be done, orders be made, steps be taken because of the color of the persons who have been discriminated against in the past.

The fact that seniority may be color-blind is a reason for not using it, not a reason for using it, because it is only color-attentive steps and procedures that are required to undo the effects of past racial discrimination.

Well, those are the reasons for the Court's denial of the motion.

And I know you have overstayed, and you could speak if you wanted at this point, but you can go otherwise. I have other matters to turn to now.

MR. SIMMONDS: Thank you, your Honor.

THE COURT: Right. I wanted to speak and give the order before Mr. Simonds left, because he is the one who will be communicating with his clients.

I will turn in a moment, if anyone wishes, to these motions for injunctions and other things. I am aware that I did not make any order explicitly in respect to the headmasters, and I will hear you further on that and these other motions in a moment. What I wish to rule upon now, in part, at least, is the motions that have been pending for two weeks.

This is the motion of the Concerned Black Educators that was filed on June 4, 1981, to order that the percentage of black faculty be increased to 25 percent, and the motion filed by plaintiffs to increase the percentage of black faculty to 22 percent. That was filed May 26, 1981.

The rulings — and then I will elaborate somewhat on those motions — are that the motion of the Concerned Black Educators is denied, and the motion of the plaintiffs to raise the percentage to 22 percent is retained under advisement for the time being. However, the Court's order on plaintiffs' motion, if it requires an increase of the black faculty percentage to 22 percent, which would match the current percentage of the black percentage of the total population of the city of Boston, will not apply to the 1981-82 school year.

What I am saying is — and I will elaborate on this in a moment — I do not deny the plaintiffs' motion, but allowance of it, if it is allowed, will not apply to the next school year. What that is designed to do is to enable the School Department to go forward with its faculty assignments without doubt as to whether the plaintiffs' motion would be granted with respect to the 1981-82 school year.

Now, the reason for denial of the Concerned Black Educators' motion is that this Court's outstanding orders simply cannot, in my view, be construed fairly as requiring that an increase in black faculty to 25 percent be achieved through reductions in force, as the Concerned Black Educators contend. The 25 percent is an affirmative action goal.

The court may, as I have indicated with respect to the plaintiffs' motion, enter further orders in this area, but the motion of the Concerned Black Educators is simply not supported by the orders or the history or the law as I understand it that is applicable to this case.

Turning now to the motion to increase the percentage to at least 22 percent, the reason the Court cannot rule on this motion at this time is that information that I requested that the school defendants supply to the court experts a couple of weeks ago has not yet been received in final form. Just — was it yesterday, Dr. Scott, or the day before?

DR. SCOTT: The day before.

THE COURT: The day before yesterday, Dr. Scott received a printout, and it took some time in preparation, apparently, because I know from more or less constant communication with him that he had asked for this, and there were efforts being made to put together the information that would be needed. Now he is going to get supplementary information, the nature of which has already been communicated to the persons in the School Department with whom he has been conferring, within the next week or so.

Here is the Court's concern: that is, that the order that the 19.1, or whatever, that 19 point percentage of black faculty be retained and maintained for the 1981-82 school year may encounter obstacles in implementation that I cannot rule on without any assurance of confidence, or perhaps I should say without sufficient assurance of confidence, to permit me to make a ruling at this time.

There has been clustering of black faculty and clustering by category of white faculty, and administrators too, but the extent of that I have been endeavoring to determine, and I have only just today got the first set of figures, and they are not really adequate.

It may be that the Court's order dated June 2, 1981, adopting the school defendants' plan for maintaining a 19.09 black faculty, may have to be supplemented in some minor respects to assure that it can actually be carried out.

It is not as easy to implement that maintenance order as might appear on the surface, and it is that problem that Drs. Dentler and Scott are looking into at my request, and that is an additional reason why I have retained under advisement the plaintiffs' motion to increase the percentage to 22 percent.

One other way of putting it is this: If it should appear that the only way of achieving broader desegregation in the faculty of the Boston public schools is to increase the minimum percentage from 20 percent to 22 percent, I want to be able to give consideration to that, but I have already stated to you that any orders along those lines would affect the 1982-83 school year and not the school year that would begin in September, so you could go forward with planning on that basis.

That may not be quite as clear as I would hope it to be, but it is by way of explanation of why I ruled on the Black Educators' motion, and it is denied, but the other one is still under advisement.

Now I will hear from other counsel who have filed motions that I have not addressed directly yet today. I wanted to give priority to the school defendants' motion, but this is not to say that I do not entertain plaintiffs' motion for a permanent injunction and for other relief, or El Comite's motion, or, for that matter, the Concerned Black Educators' motion to the extent that it goes beyond what I have already ruled upon.

To some extent, those three motions have been mooted by the Court's ruling on the School Committee's motion for modification, and by denying it. On the other hand, I want to hear Mr. Johnson with respect to his motion, if he wishes, at this time.

I do not think of motions directed to Category Two administrators to be ripe for hearing at this time. The reason I asked for hearing today the Category One administrators motion — and what that refers to is principals and headmasters; Category Two means administrators other than principals and headmasters — but the reason I did that was because of the votes of the School Committee.

There are no votes of the School Committee having to do with Category Two, so have that in mind, please, when you speak to this motion. Do you still wish to be heard on it at this time, or perhaps after other parties have filed responses? or whatever you wish.

MR. JOHNSON: Your Honor, I am just standing to speak

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 72-911-G

TALLULAH MORGAN ET AL.,
Plaintiffs,
v.
JOHN J. KERRIGAN ET AL,
Defendants.

ORDER FOR DESEGREGATION OF ADMINISTRATIVE STAFF

February 24, 1976

GARRITY, J. Upon consideration of the city defendants'[1] Plan for Desegregation of School Administrators filed September 27, 1974 and Further Information Concerning Administrators filed January 13, 1975 and Information on Administrators filed January 12, 1976 pursuant to the court's order entered January 8, 1976, and counter-proposals and legal memoranda filed by other parties, and after several hearings, it is ORDERED that the city defendants' plan, consisting of a proposal dated February 5, 1973 and approved by the school committee on April 2, 1973 and nine amendments[2] voted on December 27, 1973 (appearing in Administrative Circular No. 65 dated January 8, 1974), as further amended by the provisions of this order which follow, be adopted as an order of the court.

[1] "City defendants" refers herein to the school committee members and superintendent and not to the defendant Mayor.

[2] Defendants' plan was also amended administratively by disuse of its provisions for an interim promotional rating procedure (p. 14) and interim screening committees (pp. 21-22); and by school commitee votes on July 9, 1975 regarding required postgraduate study in the fields of educational administration and supervision and on January 22, 1976 regarding composition of community screening committees.

1. *Applicability.*

A. The plan shall apply to all administrative positions listed in the school committee's filings on January 13, 1975 and January 12, 1976, and also to administrative positions in the superintendent's office, e.g., educational, informational and fiscal specialists, and in community district offices, e.g., staff development, reading specialist and 766 coordinator positions. The plan shall not apply to clerical or secretarial staff. The plan shall apply to the position of attendance supervisor only if appointments to that position are resumed.[3]

B. Where the plan in its current form makes no provision for appointments to administrative positions to which it shall apply, e.g., positions in the superintendent's office and community district offices and guidance and pupil adjustment counselors, the city defendants shall forthwith address and propose promotional procedures and eligibility requirements with regard to such positions and shall file a plan supplement containing them on or before March 23, 1976, as to which other parties may file comments on or before April 2, 1976.

C. Provisions of the plan herein ordered supersede any inconsistent provisions in the plan proposed by the city defendants, e.g., the reference to positions of pupil adjustment counselor and guidance counselor at p. 26.

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[3] Vacancies in the position of attendance supervisor, formerly called truant officer, have not been filled in recent years. Apparently the position is being eliminated by attrition and replaced by the position of pupil adjustment counselor which has been listed in defendants' filings. See Special Report No. 26 of the Boston Municipal Research Bureau dated January 14, 1974 appended as Appendix A to defendant Mayor's comments filed December 11, 1975.

2. *Eligibility.*

A. Provisions regarding qualifying examinations and various exemptions therefrom are stricken, provided that such provisions may be reinstated if they use or incorporate by reference only examinations which have been validated by the Equal Employment Opportunity Commission pursuant to guidelines prescribed by 29 Code of Federal Regulations §§ 1607.2-8.

B. Test scores on unvalidated Educational Testing Service examinations or other unvalidated examinations shall not be considered by screening committees or appointing authorities and shall not be included in materials compiled by the Board of Examiners or other agency or person making initial determinations of eligibility, which shall be based upon objective criteria.

C. If a candidate has served in a similar position outside Massachusetts, state certification shall not be required prior to appointment, provided that the candidate is fully qualified for provisional Massachusetts certification for the appropriate administrative level pursuant to Mass. G.L. c. 71, § 38G.[4]

D. Until the 20% goals hereinafter established shall have been attained, requirements of post-master's study, i.e., post-graduate study beyond that necessary for a master's degree, shall not exceed requirements in effect before September 20, 1972 when all existing promotional rating lists were terminated, e.g., nine semester hours of additional graduate credit in administration or supervision courses for head-

[4] Cf. amendment 9 in Administrative Circular No. 65 dated January 8, 1974 (attachment "C" of defendants' plan).

masters and principals and six for assistant headmasters and principals.[5]

3. *Promotional Rating Procedures.*

A. Screening procedures appearing in the city defendants' plan, as supplemented on or before March 23, 1976 and modified by court order, shall apply to all permanent appointments except by transfers of permanent appointees pursuant to collective bargaining agreements; i.e., inapplicability to certain acting incumbents of the modified racial ratio hereinafter provided shall not affect the applicability of screening procedures.

B. Adverse determinations of eligibility by the Board of Examiners (or other agency or person making initial determinations) may be appealed by an applicant within two days after receiving notice of the adverse determination; appeals shall be in writing addressed to the associate superintendent for personnel who shall review the file and decide the appeal with or without a hearing within five days after receiving the written appeal.

4. *Community Screening Committee.*

A. Pairs of assistant principals or assistant headmasters and teachers designated at page 19 for membership on a community screening committee shall be one white and one black.

B. Each committee shall include two other minority members selected by the Community District Superintendent, one of whom shall be a school department employee.

C. Community screening commitee membership shall include four parents of students enrolled in the particular

[5] Additional hours of graduate study may of course be favorably considered in screening and rating applicants for administrative positions.

school at the time of the committee's functioning, of whom three — including at least one white and one black and preferably one other-minority — shall be selected by the school's Racial Ethnic Parents' Council (REPC), and the fourth shall be selected by any Home and School Association (HASA) for the particular school or, in the absence of an HASA for the particular school, by any other active parents' association connected with the particular school and existing as of the date of this order or, in the absence of both, by the school's REPC.

D. When a vacancy exists in a high school, membership shall include two or more students selected by the school's Racial Ethnic Students' Council (RESC), as follows: one white student and one black and one from any racial ethnic group entitled to full membership on the RESC under previous orders of the court.

E. References at page 19 and elsewhere in the plan to the School Advisory Council and Student Council are stricken and REPC and RESC respectively shall replace them where they appear.

5. *Central Screening Committee.*

A. The title "Co-Professional Screening Committee" shall be changed to Central Screening Committee.

B. Pairs of persons designated at p. 20 for membership on a central screening committee shall be one black and one white.

C. Central screening committee membership shall be enlarged so as to include on each such committee (i) one other-minority school employee and (ii) three parents of students enrolled in public schools of Boston at the time of the committee's functioning — one black, one white and one other-minority — who are members of the Citywide Parents' Advisory Council (CPAC) or Community District Advisory Councils (CDACs), to be selected by the Superintendent in consultation with the appropriate Associate Superintendent.

6. *Categories and Modified Racial Ratio.*

A. Initially, for purposes of this order, administrative positions shall be divided into two categories: first, headmasters and principals;[6] and second, all other administrative positions. As long as the racial composition of total administrators, i.e., both permanent and acting, in either category is less than 20% black, a shortage of black administrators shall be deemed to exist in that category and the modified one-to-one racial ratio herein provided for appointments, whether permanent or acting, in that category shall apply and be implemented until the shortage of black administrators shall have been eliminated. After shortages in both categories have been eliminated, a subcategory within the second category shall be recognized for purposes of this order, viz., a deferred third category comprising only administrative positions covered by sections IV and V of defendants' plan (director, associate director, assistant director, supervisor, division head and coordinator director) and any newly established equivalent positions; and if the racial composition of total administrators in that subcategory is less than 20%, a shortage of black administrators shall be deemed to exist in that subcategory and the modified one-to-one racial ratio herein provided for appointments to positions in the second category shall similarly apply and be implemented until such shortage disappears.

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[6] "Principal" means the person in charge of any elementary or middle school facility. Our use of the generic term "building administrator", which does not appear in Mass. G.L. c. 71, § 38C, but which we sometimes previously used to describe persons in charge of elementary schools in former multi-school elementary districts, which were abolished by previous orders of the court, and which has been used in some of the parties' filings, is discontinued.

B. If a shortage of black administrators exists in a category (including the deferred third category), vacancies as herein defined shall be filled in that category on the basis of one black administrator being appointed for every white administrator appointed, i.e., white and black appointments, whether permanent or acting, must alternate, and the number of white administrators henceforth given permanent appointments to vacancies as herein defined shall not at any time exceed the number of black administrators given such appointments. A vacancy in the first category shall exist when a headmastership or principalship (i) is newly established, or (ii) becomes unoccupied due to retirement, disability, reassignment, transfer or other occasion, or (iii) is occupied as of the date of this order by an acting appointee and filled, except by transfer of a permanent appointee, by the appointment of a person other than such incumbent,[7] i.e., a position now held by an acting appointee shall be counted as a vacancy unless filled permanently by the incumbent or by transfer of a permanent appointee. Similarly, a vacancy in the second category and deferred third category shall exist when an administrative position (i) is newly established, or (ii) becomes unoccupied due to retirement, disability, reassignment, transfer or other occasion, or (iii) is occupied currently by an acting appointee who was appointed to the position after February 23, 1973, or (iv) is occupied currently by an acting appointee appointed before February 23, 1973 and filled by the appointment of a person other than such incumbent, i.e., a position held by an acting appointee shall be counted as a vacancy unless filled permanently by the incumbent who has occupied it on an acting basis for three years or longer.

[7] Thus it will not be known whether this (iii) type of vacancy exists until after a permanent appointment pursuant to regular screening and appointive procedures has been made to a first category position now occupied by an acting headmaster or principal.

C. The provision in the previous paragraph that "white and black appointments, whether permanent or acting, must alternate" shall be suspended with respect to a category if there is no black candidate eligible for appointment to a vacancy of any kind existing in that category,[8] or if the only black candidates eligible for appointment to vacancies of any kind in that category have been found by the superintendent or the school committee to be unqualified for stated, particular reasons and written notice of any such finding has been given to counsel for all parties, in which event a vacancy in that category may be filled by an acting appointment without regard to race; provided that the one-to-one balance shall be restored as soon as possible by the unpaired appointment of an equal number of eligible, qualified black candidates to vacancies of any kind in that category.[9]

7. *Transfer Rights.*

Nothing herein shall limit the transfer rights of permanent administrators under the defendants' plan, which provides, see amendment 3 in Administrative Circular No. 65 dated January 8, 1974, that "rights of transfer as provided under existing contracts[10] shall be retained, subject to approval of

[8] This would appear to be an unlikely development, because the number of first category vacancies will be relatively small and the second category of administrative positions is broad, including not only highly specialized posts but also positions, e.g., guidance counselors, for which there is probably an oversupply of eligible black candidates.

[9] An analogous "catch-up" provision regarding provisional teachers is discussed in *Morgan* v. *Kerrigan*, 1 Cir., Jan. 26, 1976, slip op. at 6-7.

[10] Article VI, para. 3 at p. 9 of the agreement between the school committee and the Boston Association of School Administrators and Supervisors (BASAS) dated February 14, 1974, which we understand has been extended and is still in effect, provides that

the Superintendent and the Boston School Committee." Positions filled by such transfers shall be excluded in applying and ascertaining compliance with the modified one-to-one racial ratio herein ordered.

8. *Timetable.*

All headmasterships and principalships shall be filled by permanent appointees, i.e., pursuant to relevant screening and appointive procedures, on or before August 1, 1976.[11] Second category administrative positions and any newly established equivalent positions[12] shall be filled by permanent appointees as soon as administratively feasible, except where such positions are temporary or no candidates apply who are qualified for permanent appointment.

9. *Special Orders.*

A. On or before August 1, 1976 the city defendants shall appoint black administrators to second category administrative positions in high schools, so that every high school shall have at least one black administrator and every high school with ten or more administrators shall have at least two black administrators.

"any B.A.S.A.S. member whose position is terminated or changed for any reason beyond that member's control shall have priority of transfer over new appointees and shall be allowed a second transfer without waiting for a two-year period to elapse." If BASAS members have any different or additional "rights of transfer as provided under existing contracts", BASAS counsel in these proceedings shall file forthwith and serve on other parties copies of such contractual provisions.

[11] By so providing, we do not intend to bind the city defendants to salary arrangements currently in effect. See *Morgan* v. *Kerrigan*, 1 Cir., Jan. 14, 1976, slip op. at 49.

[12] Nothing herein prohibits the elimination of any second category position for educational, financial or other reasons.

B. The appointment of other-minority administrators shall also proceed on an accelerated basis[13]; and such appointments shall be excluded in applying and ascertaining compliance with the modified one-to-one racial ratio herein ordered.

10. *Desegregating Administrators.*

Generally, black administrators shall be appointed to positions throughout the school system. Except by leave of court on a showing of educational or administrative necessity, by the time shortages of black administrators have been eliminated, the percentage of black administrators in any one kind of administrative position, whether in central administration or in school facilities, and at each grade level in each of the nine school districts, shall not be less than one-half or more than twice the percentage of black administrators employed by the school department, e.g., assuming 20% of total administrators are black, the percentage of black supervisors, or black assistant headmasters in a particular community district, shall not be less than 10% or more than 40%.

11. *Filing of Suggested Criteria.*

The city defendants shall file and serve on or before March 23, 1976, as to which other parties may file comments on or before April 2, 1976, lists of suggested criteria to be considered by screening committees in evaluating candidates

[13] The record does not support the establishment of a specific goal for the appointment of other-minority administrators. However, this finding is without prejudice to the submission of further evidence by El Comite on behalf of other-minority students, who are a growing component of the student body.

and to be considered by the board of associate superintendents when interviewing and ranking finalists; and copies of written materials designed to assist the screening committees and board in evaluating candidates. See parts II A and B of city defendants' report filed November 12, 1974.

12. *Recruiting.*

A. The Program for Recruitment of Black Teachers and Administrators dated September 11, 1975 and approved by the city defendants on January 19, 1976 is adopted as part of this order, with the following modification: black and other-minority candidates for administrative positions who reside outside New England and who are invited by the coordinator of minority recruitment to come to Boston for screening committee or other interviews shall, at the discretion of the coordinator, be reimbursed for reasonably necessary travel, food and lodging expenses which, if so incurred, shall be paid by the city defendants, provided that any such payments fall within the programmed budget totalling $130,336.79. At the discretion of the associate superintendent for personnel, such payments may come from amounts budgeted for other items, including the amount budgeted for the position of examiner which, at said associate superintendent's discretion, may remain unoccupied or filled at a lower salary.

B. It is further ordered that the city defendants formulate and approve similar future programs for recruitment, until the percentage of black administrators in the school system shall have increased to 25% and that of other-minority administrators shall have increased substantially.

13. *Reporting.*

A. In addition to the annual report on administrators to be filed on or before July 15 pursuant to paragraph 5 on page 97

of the student desegregation plan ordered May 10, 1975, the city defendants shall file and serve on or before January 15 and March 15 of each year and on October 15, 1976 a report on the numbers of white, black and other-minority permanent and acting administrators then employed, similar in form and content to the report of the associate superintendent for personnel filed on January 12, 1976, except that such reports shall also (i) list unoccupied administrative positions and (ii) cover positions in or connected with the superintendent's office and community district offices.

B. Simultaneously with or as part of the semi-annual reports on recruiting of black faculty required by paragraph 4 at page 9 of the court's order on faculty recruiting dated January 28, 1975, the city defendants shall report on activities undertaken by them in recruiting additional black and other-minority applicants for administrative positions, until 25% of the administrators in the Boston public school system are black.[14]

United States District Judge

[14] A memorandum of decision regarding this order will be filed in the near future.

The Layoff Provisions of the BASAS Collective Bargaining Agreement.

ARTICLE XII.

Layoff

Section 1. Prior to laying off bargaining unit members, the School Committee shall notify BASAS in writing that it has such a proposed layoff under consideration. Upon receipt of any such notification BASAS shall meet with the School Committee to discuss whether the proposed layoff can be avoided, and if not, whether the proposed layoff can be effectuated through normal attrition.

Section 2. If the Committee decides after consultation with BASAS to lay off bargaining unit members, such layoffs shall be made consistent with this Agreement, Massachusetts state law, and the lawful orders of the federal court(s).

Section 3. Definitions.

a. *Seniority.* An administrator's seniority date in any given bargaining unit position (Building administrator in 1975-76 is recognized as principal's position) shall be established as of the date the administrator first served in such position on a permanent basis or on an acting basis if the acting service was continuous with the permanent appointment to such position. Seniority shall continue to accrue in a lower rated position while a member serves in a higher rated position.

The parties agree that negotiations concerning the inclusion of tenured acting administrators in this definition shall be reopened within thirty (30) days after request for same by BASAS if the Federal Court clarifies its present orders to permit a broader interpretation of rights for tenured acting administrators.

Time spent in authorized leave of absence granted for any reasons prior to September 1, 1980 will continue to count as seniority in BASAS. Paid leave of absence granted on or after September 1, 1980, including leave covered by workmen's compensation, will continue to count as seniority in the BASAS unit. Unpaid leave of absence effective on or after September 1, 1981 for any reason other than for union business under V will not count as seniority in the BASAS unit.

Any persons who serve outside of the bargaining unit in higher level positions shall accrue seniority for all service in BASAS and the higher level position.

b. *Tenured Administrator.* An administrator who has attained tenure pursuant to Chapter 71, Section 42 A.

c. *Categories:* For purpose of this Article the following shall be considered categories: Listed on separate sheet.

Section 4. Layoff Procedures.

a. This layoff procedure will not apply to non-tenured members or to BASAS members who have not been permanently appointed to a BASAS position for three (3) consecutive school years.

b. No tenured member shall be laid off hereunder if there is a non-tenured member or a member with no seniority in the affected job category.

c. Reduction in force of tenured members will be by inverse order of seniority in the affected job category.

d. Any person who loses his position due to a layoff shall be transferred to his/her previous bargaining unit position, provided, however, the bargaining unit member shall not be permitted to displace a member with greater seniority or a tenured member if the affected individual does not hold tenure in the previous bargaining unit position. If no such

position exists he shall be transferred to a BTU position for which he/she is qualified if he/she meets the requirements of 4 f. This provision neither decreases nor increases seniority rights under the BTU Agreement.

When a member exercises his rights pursuant to this Article and displaces a more junior member, the Superintendent or his designee retains the right to assign the individual to the specific position within the affected job category.

e. A member who holds seniority in only one BASAS position in central or district administration and who has twenty (20) or more years professional service in the Boston Public Schools may, subject to the federal court orders on permament positions, be assigned to a BASAS vacancy if the Superintendent determines that the member is qualified to fill that position.

f. A member who has prior teaching experience in the Boston Public Schools may exercise his right to return to the teachers' bargaining unit. Once placed in the teachers' bargaining unit said member shall be deemed to hold seniority for all service in the Boston School Department. A person who becomes a member of the bargaining unit as a result of a permanent appointment to a BASAS position on or after September 1, 1980, will not accrue seniority within the teachers' bargaining unit for time spent in the BASAS position.

g. A member who bumps a more junior member in the same job category waives any right to contest the reassignment in state or federal court and agrees that said reassignment does not constitute a demotion within the meaning of Chapter 71, Section 42 A.

h. Except in emergency situations layoffs will be effective as of the first day of any professional work year. Administrators to be laid off shall be notified in writing by the April 15th preceding the effective date of the layoff. In

emergency situations, layoffs will be effective sixty (60) calendar days following the written notice of the layoff.

i. A member who pursuant to this Article accepts a lower ranked position, accepts said position at the salary for the lower position provided, however, that the salary of a principal or headmaster who is assigned to a smaller school as a principal or headmaster shall not be reduced.

Section 5. Recall.

a. Members on recall will be given first preference in filling permanent vacancies in the category from which the affected members were laid off on the basis of seniority.

b. Recall rights shall be retained for two (2) full school years from the effective date of layoff unless sooner terminated by rejection of two (2) recall offers or failure to report for work within fifteen (15) calendar days after receipt of such recall notice.

Section 6. This layoff and recall procedure is subject to all applicable state and federal laws and lawful orders pursuant thereto.